

# The Gambia and the Rohingya's nightmare

## Which opportunity for individual criminal accountability after the possible ICJ decision against Myanmar for genocide?

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The Gambia submitted an application to the International Court of Justice (ICJ) on 11 November 2019 against the Republic of the Union of Myanmar for acts of genocide committed against the Rohingya people. The proceedings have been initiated in application of the Genocide Convention of 1948 which both countries have ratified. They have also accepted the ICJ's jurisdiction provided for therein under article IX. The Rohingya constitute a minority group which lives in the Rakhine state in the west of Myanmar. They have been subject to persecutions, including the denial of their Myanmar citizenship, for quite a long time. The Gambian application originates from the situation which started from October 2016 when Myanmar decided to undertake a number of clearance operations in Rohingya villages, causing the deportation of hundreds of thousands of people into the neighbouring state of Bangladesh (Application, paras. 47-48). A second wave of clearance operations took place from August 2017 and was allegedly more brutal than the previous one (Application, paras. 69 and 75). According to The Gambia, the military and security forces of Myanmar executed a planned policy of destruction of the Rohingya people, in a whole or in part, because of their ethnic or racial identity and Muslim religious belief (Application, paras. 27, 29-31). Genocidal acts for which The Gambia has requested the ICJ to establish Myanmar's responsibility include mass killings, rapes and other acts of sexual violence and the systematic destruction by fire of villages with victims locked inside burning houses (Application, para. 6). The Gambia has also applied for the indication of provision measures before a decision on the merits. The proceedings have been initiated the support of the Organisation of Islamic Cooperation.

This case raises several important legal issues. Some relate to the plurality of roads to accountability for the Rohingya nightmare ([Rachel Khoo](#)), and how they can complement each other. Others concern the establishment of the ICJ's jurisdiction as it is not entirely clear that a dispute exists between both countries, and the test for the indication of provisional measures ([Thomas Van Poecke](#), [Marta Hermez](#) and [Jonas Vernimmen](#)). Another problem is the extent to which the applicant can request reparation measures for victims while he has not himself suffered a direct prejudice ([Dimitrios A. Kourtis](#)). The Gambia is rather relying on its right to ensure the respect for collective interests enshrined in the Genocide Convention.

The present post turns around a different and hypothetical question. What might be the incidence of an ICJ decision establishing Myanmar's responsibility for genocide on ensuring the criminal accountability of individual perpetrators? The post gives an insight into the penal options which might be available for Myanmar in this regard. It also explores the possible involvement of the UN Security Council in the matter should Myanmar disregard the expected ICJ decision. Before all of that, it is important to say something on the link between the said ICJ decision and criminal accountability.

### **The link between the expected ICJ decision and individual criminal accountability**

The ICJ is not a criminal court. It decides on state responsibility. However, this does not mean that an ICJ decision cannot have some connections with criminal accountability. To some extent, the ICJ can decide on criminal law issues in the course of a case against a state. Examples of proceedings involving African countries are many in this regard, such as in [Belgium v. Senegal](#) (2012), [Congo Brazzaville v. France](#) (2003), [Djibouti v. France](#) (2008), and [Democratic Republic of Congo v. Belgium](#) (2002). The ICJ does not make an exception at the international arena. The case is well known before international human rights courts doing international criminal law by other means (see [Alexandra Huneus](#)).

The Gambian application is therefore another opportunity for the ICJ to decide on criminal issues through the rules on state responsibility. This is plain from the reading of the Gambian application as it is based on alleged violations of a penal international instrument, the Genocide Convention. More specifically, Myanmar is brought before the ICJ for, among others, the commission of genocide and the failure to punish individual perpetrators (Application, paras. 2 and 111). This widely justifies the relief sought by The Gambia that the ICJ declares that Myanmar "must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal, as required by articles I and VI" (Application, para.112) of the Genocide Convention. If this is done, it is important to recall that the ICJ judgment will be binding on both litigant states.

There are benefits for the ICJ to decide on such criminal issues. In fact, the case appears to be the only viable way to provide relief to victims, thereby compensating for the shortcomings of the existing external roads to criminal accountability. First, the ICC is not competent to try those who are responsible for criminal conducts that have occurred entirely on the territory of Myanmar, which is not a state party and has not accepted the Court's jurisdiction. As the ICC decided in its [Decisions of 6 September 2018](#) (at paras. 64, 71, 72 and 73) and [14 November 2019](#) (at paras. 120 and 124), its jurisdiction is limited only to criminal conducts of which a part at least has occurred on the territory of a state party, that is, mainly Bangladesh where many Rohingya people have reportedly fled. Myanmar would then be obliged, if it loses the case and is ordered to provide the relief sought by The Gambia, to punish those individual perpetrators through the means at its disposal, including its domestic criminal law. Second, it is self-evident that criminal prosecutions by third states on the basis of the principle of universal jurisdiction, like in Argentina where a complaint has been deposited on behalf of victims by a human rights organization

([Rachel Khoo](#)), do not have great chances of success. The major obstacle would stem from the lack of cooperation of Myanmar, not only for the mere completion of investigations by foreign prosecutors, but also in the extradition of suspects. Additionally, contestations such as those which have proliferated against universal jurisdiction, mainly from African states (see [here](#)), may arise again. This is the case with immunities of state officials before foreign criminal jurisdictions. Another issue would be the duty to respect the sovereignty of a foreign country by refraining from prosecuting its incumbent military, civil and political leadership, particularly if such prosecutions are conducted *in absentia*.

After all, it remains to be seen how Myanmar could act to give effect to the expected ICJ's decision and punish alone individual perpetrators of genocide against the Rohingya minority group.

### **The potential criminal options for Myanmar after the expected ICJ's decision**

If Myanmar is found responsible for genocide against the Rohingya and ordered to try the individual perpetrators, the question is how it must comply with the ICJ's decision. Two options would be available.

First, perpetrators can be prosecuted and judged before domestic courts and tribunals of Myanmar. However, for this option to be effective, there would be a need to introduce new domestic legislation into the legal system of Myanmar, which is apparently lacking today. The Gambia has anticipated on this problem. It has made a request to the ICJ to find and declare that Myanmar had violated its obligations under the Genocide Convention by failing to enact the necessary legislation to give effect to this treaty (Application, paras.111 and 112). The delay which may take the process of adopting this new legislation could serve as another alibi not to prosecute the individual perpetrators in due time. Such a default of judicial promptness would run against the interests of justice; in this case, the availability of evidence and the protection of the rights of victims who might be waiting for reparations as a result of those municipal criminal trials. Therefore, this first option is less realistic as those who have perpetrated genocide under the state umbrella may lack the political will to leave courts and tribunals of Myanmar the necessary independence for their own punishment

Second, Myanmar can decide to accept the ICC jurisdiction in accordance with article 12 (3) of the Rome Statute. This option of delegated jurisdiction is based on the fact that the lack of adequate domestic legislation to prosecute genocide constitutes a case of Myanmar's incapacity to exercise its primary jurisdiction over the crime. However, again, that would be very easy only in theory. Nothing indicates now that Myanmar will be willing to choose such an option. It may not participate in the Gambian proceedings before the ICJ and finally disregard the latter's decision.

The challenging question then arises as to the reaction of The Gambia, on the one hand, for it has a tangible interest to have Myanmar comply with the expected ICJ decision, and, on the other hand, the international community, which cannot tolerate that such an odious crime of genocide goes unpunished. In this context, the Security Council would become the last resort.

## **The involvement of the UN Security Council as the final resort**

There are two ways through which the Security Council may get involved in the enforcement of Myanmar's obligations after the ICJ has delivered its expected judgment on the Gambian application. First, this may be by way of article 94(2) of the UN Charter which entitles The Gambia to have recourse to the Security Council which then may "make recommendation or decide upon measures to be taken to give effect to the judgment". Second, the Security Council can get involved if it is seized by any of its member states or any UN member or the Secretary-General in accordance with the relevant provisions of the Charter. The situation of genocide could be dealt with as a threat to international peace and security. It is self-evident that the commission of such an international crime and the spread of its consequences in neighbouring countries reach the threshold to allow the Security Council to take action on the basis of Chapter VII of the Charter.

As to the measures that the Security Council can take, there are two main possibilities, if Myanmar does not organise criminal prosecutions alone. First, the Security Council can impose, on the basis of Chapter VII, a duty on Myanmar to extradite its nationals to a third state which has initiated proceedings against the suspects in application of universal jurisdiction. The imposition on a state of an obligation to extradite its own nationals to a third state will not be new. A past example is known with the Lockerbie case ([SC Res.748 \(1992\)](#) of 31 March 1992, para.1). Second, the Security Council may choose to refer the situation to the ICC Prosecutor. This would expand the ICC jurisdiction over criminal acts committed in the territory of Myanmar. In this context, judicial efficacy would be enhanced due to the combination with the territorial jurisdiction which the ICC has already ascertained in respect of criminal conducts of which a part at least has occurred in neighbouring countries to Myanmar, which are states parties to the Rome Statute. The process of ensuring criminal accountability will be strengthened.

In any case, an obstacle to the road to individual criminal accountability still persists. In fact, it is not evident that a Security Council resolution is easy to adopt to that effect, without being opposed by a veto of one of the permanent member states. The question which needs to be debated is whether in such a context of commission of genocide, the use of veto power could be consistent with international law. In other words, would a permanent member state which decides to veto a Security Council resolution taking measures to the effect of ensuring the punishment of individual perpetrators of genocide violate international law? The question deserves a more profound discussion especially if the ICJ finds Myanmar to be in breach of the Genocide Convention with the genocidal acts then already established by a court.

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